U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 2 0 2015 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner provides information technology services. It seeks to permanently employ the beneficiary in the United States as a senior Cognos/applications developer. The petition requests classification of the beneficiary as a member of the professions holding an advanced degree under section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is July 9, 2012, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The Director concluded that the record did not establish the beneficiary's possession of the qualifying experience for the offered position. Accordingly, the Director denied the petition on May 27, 2014.

The record indicates that the appeal is properly filed and alleges specific errors in law or fact. The record documents the case's procedural history, which is incorporated into this decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The Beneficiary's Qualifying Experience

A beneficiary must meet all of the requirements of an offered position specified on the accompanying labor certification by the petition's priority date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of the labor certification to determine the minimum requirements of the offered position. We may not ignore a term of the labor certification, nor may we impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

[1] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

In the instant case, the accompanying ETA Form 9089 states the following minimum requirements for the offered position of senior Cognos/applications developer:

H.4. Education: Master's degree in computer science.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months as a "computer/applications programmer."
H.14. Specific skills or other requirements:

> 5 years experience coding, testing, and debugging w/ C#, ASP.net, SQL Developer 1.5.1, SQL Server and Toad 9.0.1. Candidate must have development and engineering experience with the following technologies[:] 6 mos. w/ IBM Cognos BI 10.1.1[;] 2 yrs. w/ IBM Cognos BI 8.4.1[;] 4 yrs w/ IBM Cognos 8.1/8.2[;] 3 yrs. w/ Windows 2008, IIS 7[;] 5 yrs MS Office Suite including MS Project[;] 2 yrs. w/ IE8/9, Firefox 3.5.8, PL/SQL[;] 5 yrs Experience with Relational Databases such as Oracle 9i/10g/11g or AS400 database[;] 4 yrs of Experience with Business Analysis/Project Management/Project Coordination[;] 4 yrs experience with documentation of BRD, SRD, FRD, Use Cases, Test Plans and Test Cases[;] 1 year exp w/ IBM Mainframes (AS400)[;] 4 years exp w/ Requirement Management Tools such as Rational Suite/Doors[.]

The beneficiary attested on the labor certification to more than 100 months of full-time, related employment experience before joining the petitioner in the offered position on September 1, 2011. His stated experience included the following:

- About 35 months as a senior systems analyst for . in the United States from October 1, 2008 to August 30, 2011;
- About seven months as a senior systems analyst for ; in the United States from February 15, 2008 to September 30, 2008;
- About seven months as a business analyst for . in the United States from December 1, 2005 to June 30, 2006;
- About six months as a graduate public service intern at the at in the United States from August 1, 2005 to January 30, 2006;
- About 12 months as a systems analyst for in India from July 1, 2003 to June 30, 2004; and
- About 42 months as a web editor/developer for in India from January 1, 2000 to June 30, 2003.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers giving the name, address, and title of the employer, and a description of the alien's experience. 8 C.F.R.

§ 204.5(g)(1). If required documentation is unavailable, a petitioner must document its unavailability before we would consider secondary evidence, such as government or business records. 8 C.F.R. § 103.2(b)(2)(i). If secondary evidence is also unavailable, a petitioner must demonstrate the unavailability before we would consider two or more affidavits from people who are not parties to the petition and who have direct personal knowledge of the event and circumstances. *Id.*

The record contains a December 17, 2012 letter from the director of the office of graduate intern programs at the [redacted] confirming the beneficiary's employment as a graduate public service intern. However, the letter states that the beneficiary worked from August 16, 2005 to December 15, 2005, not from August 1, 2005 to January 30, 2006 as the beneficiary attested on the labor certification. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

On appeal, the petitioner asserts that the labor certification contained "clerical errors" and that the beneficiary actually worked as an intern from August 16, 2005 to December 15, 2005 as the university letter states. The petitioner provides a copy of the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for 2005, indicating that the university paid the beneficiary $2,570.16 that year.

Despite the Form W-2, however, the record does not establish the beneficiary's claimed full-time employment by the university from August 16, 2005 to December 15, 2005. The beneficiary attested on the labor certificate that he began working for [redacted] on December 1, 2005, before the conclusion of his internship. His university transcript also indicates that he completed five credits towards his Master's degree during the fall semester of 2005. The record does not explain how the beneficiary simultaneously pursued graduate studies and worked full-time for the university and [redacted] *See Matter of Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

Also, the record indicates that the beneficiary received academic credit for his internship. The beneficiary's transcript states that he completed one credit in "GPSI: Org Environ/Public Service" during the fall semester of 2005, suggesting that his public service internship was part of his graduate program. If the internship was part of the beneficiary's graduate studies, it would not seem to constitute employment experience. *See Matter of Avon Prods., Inc.*, 88-INA-348, 1989 WL 250441, *4 n.4 (BALCA July 27, 1989) (questioning whether an alien's work at a corporation constituted employment experience for labor certification purposes where the employer stated that the experience was "part of her MBA [Master of Business Administration] program in International Business Studies").

In addition, neither the university letter nor the Form W-2 confirm the beneficiary's claim of *full-time* employment as an intern. If he worked on only a part-time basis, he may not possess the required amount of qualifying experience. *See Matter of Cable Television Labs., Inc.*,, 2012-PER-00449, 2014 WL 5478115, *2 (BALCA Oct. 23, 2014) (finding that, for labor certification purposes, an alien's part-time employment experience equated to half that amount in full-time experience).

The record therefore does not establish the beneficiary's claimed, full-time qualifying experience as a university intern.

The record also contains letters from and stating that the beneficiary worked for these companies from February 2008 to October 2008 and from October 2008 to September 2011, respectively. However, neither of the letters state that the beneficiary worked on a full-time basis.

In addition, the record contains a December 18, 2012 letter from the president of stating that the beneficiary was "contracted through our agency at from December 2006 to March 2008. However, the beneficiary did not identify as one of his prior employers on the labor certification. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (BIA 1976), *disapproved of on other grounds by Matter of Lam*, 16 I&N Dec. 432 (BIA 1978) (finding testimony of qualifying experience by an applicant for adjustment of status to be not credible where the labor certification did not state that experience).

In response to the Director's Request for Evidence (RFE), dated August 20, 2013, the petitioner provided affidavits from the beneficiary and a purported coworker of his at The coworker's affidavit states that was a client of to whom he and the beneficiary provided services while working for from December 2005 to June 2006. The affidavits also state that the beneficiary and his purported coworker were unable to contact by telephone or email to obtain experience letters from the company, and that the company's website no longer exists.[2]

The coworker's affidavit appears to clarify that employed the beneficiary and his coworker and that, through contracted their services to However, letter states that the beneficiary provided services to from December 2006 to March 2008, while the beneficiary and his coworker attested that the beneficiary worked for from December 2005 through June 2006.

On appeal, the petitioner provides copies of the beneficiary's Forms W-2 from and a new letter from president. However, the Forms W-2 indicate that paid the beneficiary $4,875 in 2006 and $27,072 in 2007. Thus, the Forms W-2 indicate that the beneficiary worked for in 2006 and 2007, not from December 2005 to June 2006 as he attested on the labor certification and as both he and his purported coworker attested in their affidavits.

The new letter from president, dated July 16, 2014, confirms the company's role in contracting the services of the beneficiary to . However, the letter states that the beneficiary worked for from December 1, 2006 to June 30, 2007. These

[2] Online New Jersey records indicate that was incorporated on December *See* State of N.J., Div. of Revenue & Enter. Servs., at https:// (accessed Feb. 25, 2015). The online records do not indicate the company's current status.

employment dates differ from the dates to which the beneficiary and his coworker attested. The June 30, 2007 end date of employment stated in the new letter also conflicts with the March 2008 end date in the prior letter of president. The inconsistencies in employment dates among letters, the Forms W-2, and the attestations of the beneficiary and his coworker cast doubts on the beneficiary's claimed employment with *See Matter of Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies by independent, objective evidence).

Also, the 2014 letter from president appears to be a draft letter prepared for him by someone outside of employ. The president signed and handwrote his name, email address, phone number and address on the draft letter, while the letter appears to have called for a newly printed document with that additional information typewritten on it. The letter's apparent preparation by another casts doubt on whether it reflects the president's personal knowledge, or the company's records, of the beneficiary's experience.

The petitioner also states on appeal that the in India did not employ the beneficiary, as stated on the labor certification. Rather, the petitioner asserts that the beneficiary's actual employer during those periods, of India, assigned the beneficiary to perform work at the institutes. The petitioner submits a February 8, 2013 letter from a human resources manager on stationery, stating that the company employed the beneficiary from January 2000 to June 2004 and assigned him to work at the institutes, which were its clients.

However, the record contains copies of the beneficiary's Bachelor of Engineering degree and memorandum of marks from in India, indicating that he received his undergraduate degree in July 2003 after four years of full-time study. The record does not explain how the beneficiary worked full-time for from January 2000 to June 2004 while studying full-time at during the same period. *See Matter of Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

In addition, the letter on stationery is dated February 8, 2013, before the petition's filing date of March 6, 2013. The record does not explain why the petitioner waited until this appeal to submit a letter from the beneficiary's purported true employer from January 2000 to June 2004. *See Matter of Ho*, 19 I&N Dec. at 591-92 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence in support of a petition).

The record also does not establish the beneficiary's possession of all of the special requirements of the offered position, as specified at Part H.14 of the ETA Form 9089. Part H.14 states that the offered position requires, among other things, four years of experience with IBM Cognos 8.1/8.2. An October 16, 2012 letter from a director on stationery states that the beneficiary's 35-month tenure with the company included experience with IBM Cognos 8.1/8.2. However, the letter

on Broadlight stationery is the only experience letter of record that specifies the beneficiary's experience with IBM Cognos. The record therefore does not establish the beneficiary's possession of four years, or 48 months, of experience with IBM Cognos 8.1/8.2, as required by the labor certification.

The petitioner attributes many of the inconsistencies of record to its prior counsel, alleging that she "did not take care in drafting Form ETA 9089 nor in presenting the evidence with the I-140 petition to the Texas Service Center." However, we will not consider the petitioner's allegations because it has not satisfied the requirements for a valid claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10, 13-14 (1st Cir. 1988) (requiring details of the representation agreement with prior counsel, evidence that prior counsel was afforded an opportunity to respond to the allegations, and an explanation of whether a disciplinary complaint against counsel was filed with appropriate authorities); *see also Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006) (stating that "[w]e will reach the merits of an ineffective assistance of counsel claim where the alien substantially complies with the *Lozada* requirements"). We therefore will not consider the petitioner's allegations against its former attorney.

Moreover, the beneficiary attested to the truth and accuracy of his employment history on the accompanying labor certification. The record does not contain any evidence that the beneficiary did not review the information on the labor certification and find it to be true and correct as he attested on the ETA Form 9089.

For the foregoing reasons, the record does not establish the beneficiary's qualifying experience for the offered position by the petition's priority date. We will therefore affirm the Director's decision.

The Petitioner's Ability to Pay the Proffered Wage

Beyond the Director's decision, the record also does not establish the petitioner's ability to pay the proffered wage.[3]

A petitioner must demonstrate its continuing ability to pay a proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

As indicated previously, the instant petition's priority date is July 9, 2012. The labor certification states the proffered wage of the offered position as $97,323 per year.

[3] As a general principle of administrative law, an agency retains all the powers on review that it would have in making the initial decision. *See* 5 U.S.C. § 557(b); *see also Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (noting that we may deny an application or petition even if a director does not identify all of the grounds for denial in the initial decision).

The record before the Director closed on November 19, 2013, with his receipt of the petitioner's response to his RFE. As of that date, copies of the petitioner's annual report, federal income tax returns, or audited financial statements for 2012 were presumably available. *See* U.S. Internal Revenue Serv., Instructions to 2012 Form 1120S U.S. Income Tax Return for an S Corporation, at http://www.irs.gov/pub/irs-prior/i1120s--2012.pdf (accessed Feb. 25, 2015) (stating that an S corporation's income tax returns must generally be filed by the fifteenth day of the third month after the end of its tax year).

However, the Director's RFE neglected to request evidence of the petitioner's ability to pay the proffered wage in 2012. The record contains copies of the first pages of the petitioner's federal income tax returns for 2009, 2010, and 2011.

The petitioner provided a copy of the beneficiary's 2012 Form W-2. However, this document is not among the types of initial evidence required by 8 C.F.R. § 204.5(g)(2). Although the regulation permits the submission of additional evidence of ability to pay, additional materials may not substitute for required evidence.

Also, the 2012 Form W-2 indicates that the petitioner paid the beneficiary $88,285.07, less than the annual proffered wage of $97,323 stated on the labor certification. Therefore, even if the petitioner had submitted required evidence for 2012, the Form W-2 would not establish its ability to pay the proffered wage.

The petitioner also provided copies of the beneficiary's earnings statements from December 2012 and January 2013. However, like the Form W-2, the earnings statements are not among the types of initial evidence required by 8 C.F.R. § 204.5(g)(2). Also, the earnings statements indicate that the beneficiary received $3,937.50 biweekly, or $94,500 per year, which is less than the annual proffered wage of $97,323.

Because the record does not contain copies of the petitioner's annual report, federal income tax returns, or audited financial statements from the petition's priority date of July 8, 2012 pursuant to 8 C.F.R. § 204.5(g)(2), the record does not establish the petitioner's continuing ability to pay the proffered wage.

Conclusion

The record does not establish the beneficiary's possession of the qualifying experience stated on the accompanying labor certification by the petition's priority date. We will therefore affirm the petition's denial on this ground. The record also does not contain required evidence of the petitioner's continuing ability to pay the proffered wage. We will therefore also dismiss the appeal on this basis.

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, the petitioner bears the burden of

establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361 *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.